

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-219654.3

DATE: April 30, 1986

MATTER OF: Small Business Administration--
Request for Reconsideration

DIGEST:

Prior decision in The W.H. Smith Hardware Co., B-219654, Nov. 12, 1985, 85-2 C.P.D. ¶ 536, is clarified to assure that it not be construed as establishing a waiver from the Certificate of Competency procedure.

The Small Business Administration (SBA) requests that we reconsider the holding of our decision in The W.H. Smith Hardware Co. (Smith), B-219654, Nov. 12, 1985, 85-2 C.P.D. ¶ 536. In that decision, we held that while there was no small purchase exception from the requirement that a procuring activity--here, the Defense Logistics Agency (DLA)--submit a small business nonresponsibility determination to the Small Business Administration (SBA) for consideration under the certificate of competency (COC) procedures, the nonreferral at issue was not prejudicial to Smith because SBA had denied three Smith COC referrals from the DLA within the 2 months after the agency's nonresponsibility determination in the present procurement. We viewed these as affirming the agency's determination since the same facts were in issue.

SBA requests reconsideration on the basis that procuring agencies are required to refer nonresponsibility determinations to SBA for final disposition on each specific procurement and because of its concern that agencies may interpret the decision as providing an exemption. We affirm the decision. However, in view of SBA's stated concern with the possible ramifications of the decision, we provide the following clarification for future application.

The Smith decision was limited to a particular set of relatively unique facts. Smith had been found nonresponsible under a small purchase procurement at a time when the SBA had amended its regulations to remove the former small

purchase COC referral exemption, but the Federal Acquisition Regulation (FAR) had not been revised to reflect this change. As a result, the DLA contracting officer did not refer his nonresponsibility determination for Smith to SBA, since DLA and the FAR council were still considering how to deal with the change. Subsequently, the FAR council drafted a revision (FAR § 19.602-1(a)(2) (1984)), which eliminates the small purchase exception. Thus, this possible basis for nonreferral has been eliminated.

In our decision, we pointed out that the Small Business and Federal Procurement Competition Enhancement Act of 1984, Pub. L. No. 98-577, § 401, 98 Stat. 3,082, October 30, 1984, prohibits any exemption from the requirement for referral of small business nonresponsibility determinations to SBA for COC consideration. We went on to note that within the 2 months subsequent to Smith's nonresponsibility determination, DCSC had referred three other Smith nonresponsibility determinations to SBA for COC consideration, and all had been denied. SBA's determination included a finding that Smith was nonresponsible because of its historically high delinquency record, notwithstanding recent improvement--the same basis on which the DCSC contracting officer had found Smith nonresponsible under the procurement at issue. In this limited fact situation, we determined that Smith had not been prejudiced by the erroneous DLA decision not to refer, essentially because SBA's COC denials in the same timeframe served to affirm the DCSC nonresponsibility determination.

This decision does not sanction the nonreferral and it makes clear that referral was required in this case. The holding is based on the fact that Smith was not prejudiced because of the particular fact situation. This is consistent with previous decisions of our Office, which were cited, and which were based on the limited factual circumstances in each protest. See Sayco Ltd., 62 Comp. Gen. 469 (1983), 83-1 C.P.D. ¶ 656; and Sigma Industries, Inc., B-195377, Oct. 5, 1979, 79-2 C.P.D. ¶ 242. To our knowledge, neither of these prior cases has been construed to establish COC referral exemptions or waiver authority, nor should the Smith decision be so construed.

Finally, DLA has advised us informally that it does not intend to use the decision as a basis for not referring nonresponsibility determinations to SBA where a particular

concern was recently denied a COC. Moreover, DLA indicates that it has informally advised its contracting personnel that the Smith decision should not be construed as establishing a waiver from the COC referral requirements.

for Milton J. Howler
Comptroller General
of the United States